

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

<b>CHUKCHANSI GOLD RESORT</b>	)	
<b>AND CASINO</b>	)	
	)	
<b>COMPANY</b>	)	<b>DECISION AND AWARD</b>
	)	
<b>UNITE HERE LOCAL 19</b>	)	<b>of</b>
	)	
<b>UNION</b>	)	<b>WALTER KAWECKI, JR.</b>
	)	<b>ARBITRATOR</b>
<b>Re: Discharge of Miranda Hackworth</b>	)	
<b>FMCS Case No. 06-04129</b>	)	<b>November 24, 2006</b>
	)	

<b>Appearances:</b>	<b>Arbitrator:</b>	<b>Walter Kaweck, Jr., Esq.</b> <b>756 Barton Way</b> <b>Benicia, CA 94510</b>
	<b>Company:</b>	<b>Michael Robinson, Esq.</b> <b>Monteau &amp; Peebles</b> <b>1001 2<sup>nd</sup> Street</b> <b>Sacramento, CA 95814-3210</b>
	<b>Union:</b>	<b>Kristin L. Martin, Esq.</b> <b>Davis, Cowell &amp; Bowe, LLP</b> <b>595 Market Street, Ste. 1400</b> <b>San Francisco, CA 94105</b>

**BACKGROUND**

The arbitration hearing was held on October 5, 2006 at the Chukchansi Gold Resort and Casino at 711 Lucky Lane, Coarsegold California.

This hearing arose pursuant to the 2005-2009 Collective Bargaining Agreement (CBA) between The Picayune Rancheria Of Chukchansi Indians of California (for Chukchansi Gold Resort and Casino) and Unite Here, International Union (for Unite Here Local 19) under which Miranda Hackworth, an employee of Chukchansi Gold

Resort & Casino, filed a timely grievance because of her termination from employment by Chukchansi Gold Resort & Casino.

In accordance with the CBA, Walter Kaweck, Jr. was selected by the Company and the Union to serve as Arbitrator, from a list provided by the Federal Mediation and Conciliation Service.

At the hearing the parties were given an opportunity to state their positions, examine and cross-examine witnesses, present documentary evidence and argue their case. The parties stipulated that the arbitration case was properly presented before the Arbitrator, and that the Arbitrator has jurisdiction and retention of the case.

The parties agreed, on the record, that they would complete closing briefs which would be submitted and postmarked on November 4, 2006 to the Arbitrator and to each other. Off the record, at the end of the hearing, the parties agreed to postmark the closing briefs on November 3, 2006. The parties also agreed the Arbitrator would close the hearing upon receipt of the closing briefs and have 30 days from receipt of the closing briefs to complete his decision and award. The closing brief for the Union was postmarked November 3, 2006 and the closing brief for the Company was postmarked November 8, 2006. The Company did not request an extension for this delay. However, the Arbitrator decided to review and consider the closing briefs of the Company, as well as the closing brief of the Union because, in the opinion of the Arbitrator, the delay did not affect the decision and award of the Arbitrator.

## **ISSUE**

The issue agreed to by the parties is the following: “Was Miranda Hackworth terminated for just cause; if not, what is the appropriate remedy?”

## **RELEVANT CONTRACT TERMS**

### **Section 3. Management Rights**

Subject only to limitation as may be imposed by this agreement, the Union recognizes that the management of the business and the direction of the working force is vested exclusively in the Employer, including but not limited to the right reasonably; to schedule work; to determine whether a position is to be filled by a full time or part time employee; to assign work and working hours to employees; to decide the work amount and location; to determine the type of services performed; to establish reasonable quality and performance standards; to require from every employee compliance with normal operating procedures; to formulate and enforce employer rules and regulations now in effect or hereinafter enacted; to hire, suspend, promote, demote, transfer, discharge, discipline for cause, or relieve employees from duty because of lack of work or for other legitimate reasons; to maintain discipline and efficiency of employees; to judge skill, ability, and physical fitness; to create, eliminate or consolidate job classifications; to control and regulate the use of all equipment and other property of the Employer; and to subcontract work. The above listed rights reserve to the Employer are not intended to deny or limit the Employer in relation to other managerial rights

which are not covered by this agreement and which have been previously exercised.

### **Section 23, Discipline and Discharge**

The Employer shall only discipline, suspend or discharge employees for reasons of just cause. The Employer has the right to set reasonable rules and procedure for which discipline may be imposed.

1. Except in the event of egregious behavior, discipline should be progressive in nature. Written discipline notices (written warnings, suspension and terminations) issued to employees must specify the events or action for which the notice is issued. Written disciplinary notices shall be issued to employees within five (5) working days of the event or action for which the written disciplinary notice is being issued or within five (5) working days after the Employer first became aware of such event or action. The Employer's failure to impose greater or any disciplinary action against an employee shall not be used as precedent on behalf of another employee.
2. A legible copy of any written disciplinary notice shall be given immediately to the employee. In the case of terminations, the Employer will forward notices of terminations to the Union within fourteen (14) days of termination.
3. An employee may request the attendance of a Union Committee Member or Union Representative at an investigatory interview or meeting where the employee reasonably and in good faith believes discipline may result from such investigatory interview or where disciplinary measures may be taken.

7. Written warning notices shall be null and void after a period of twelve (12) consecutive months and shall not be used by the Employer in any subsequent discipline, discharge or promotion or transfer issue. Notices of suspension shall be null and void after a period of eighteen (18) months and shall not be used by the Employer in any subsequent discipline, discharge or promotion or transfer issue.

### **FACTS**

The Grievant, Miranda Hackworth, was hired by Chukchansi Gold Resort & Casino in August 2003 as a cashier. She was promoted to server in one of the restaurants at Chukchansi. The Grievant quit for three months for personal reasons. The Grievant was then rehired as a server. She was subsequently promoted to a bartender in August 2005.

On May 16, 2006, the Grievant was terminated from employment with Chukchansi Gold Resort & Casino. Prior to the termination of the Grievant, the Human Resources Director, Marilyn Emel discussed a bottle cap incident that occurred on May 9, 2006 between the Grievant and bartender Kristine Merrifield. This was discussed with Manager Brian Galt and Department Head Steve Uricchio. Additionally, Ms. Emel, Mr. Uricchio and Richard Simms, the Assistant General Manager watched the videotape and Ms. Emel supported the termination action. However, Ms. Emel informed her team relations manager, Gilbert Cordero about the video coverage of the bottle cap incident and asked him to investigate the matter.

Ms. Emel also testified that she spoke with Kristine Merrifield about the grievant throwing a bottle cap at Ms. Merrifield. Ms. Emel also testified she received a letter from

Kristine Merrifield which was dated May 17, 2006. The letter stated the following:

“During my shift at Center Bar on May 9<sup>th</sup>, Miranda H. threw a bottle cap at me and struck me in the neck. This is not the first time she has thrown something at me behind the bar. On several occasions she has thrown ice, bottle caps, water and bottles. I have asked her to stop many times.” The letter was not addressed to anyone and it was signed with the name Kristine Merrifield. Ms. Emel testified she thought she had received it by May 16, 2006 even though it was dated May 17, 2006, however she was not sure of the date it was received.

On May 16, 2006, Beverage Manager Brian Galt brought the Personnel/Payroll Action Notice for Miranda Hackworth’s termination to Team Relations Manager Gilbert Cordero for his signature, as a Human Resource Department representative. Gilbert discussed the case including the video footage of the incident, signed the Personnel/Payroll Action Notice but he did not watch the video footage. (TR 79)

An undated memo from Steve Uricchio to Gilbert was submitted into evidence. The memo states that Mr. Uricchio decided to stick by the decision to terminate Miranda Hackworth.

Also on May 16, 2006, a team member counseling termination notice (notice) was issued and signed by the grievant’s manager, Bryan Galt, by the department head Steve Uricchio and by Gilbert Cordero, a team relations manager and representative of the Human Resource Department.

The notice stated that Miranda Hackworth, the grievant, in the position of bartender, was terminated from employment for violation of company policies/practices. Specifically, it stated that on May 14, 2006, it was reported to the Beverage Manager that

bartender Miranda Hackworth had struck bartender Kristine Merrifield with a bottle cap in the neck. This incident was reported to have occurred on May 9, 2006. This incident was verified by surveillance footage from that date. The notice had check marks in boxes indicating there had been previous written counseling's for attendance, violation of policies and attendance issued to the grievant.

On May 16, 2006 at about 5:00 p.m. the grievant was called into the Human Resource Department to meet with the Human Resource Director, Marilyn Emel. The grievant was represented by her Union representative, Georgette Heck. Ms. Emel notified the grievant that she was going to be terminated from employment and asked the grievant if she had anything to say about the "incident" referenced in the team member counseling notice of termination. Neither the Grievant nor her Union Representative was given an opportunity to review the video footage showing the bottle cap incident occurring on May 9, 2006.

The Grievant was given the termination notice and refused to sign it, however the grievant wrote in the employee comments section the following: "I never maliciously threw a bottle cap at Kristine Merrifield." The Grievant also testified she popped caps off of two to four hundred beers per shift and could not remember the incident of May 9th.

Ms. Emel testified that the Grievant stated that she was popping the cap into the garbage and Kristine Merrifield has it out for her. Ms Emel wrote a note about this comment, signed and dated it May 16, 2006 at 5:15 p.m. identifying Georgette, Marilyn and Miranda. The note was received into evidence. The Grievant and Georgette Heck both testified that the grievant stated she could not remember the incident and she may

have been popping the cap into the garbage. The grievant was then terminated from employment.

### **COMPANY POSITION**

On May 9, 2006 Miranda Hackworth (Hackworth) intentionally threw the bottle cap into the face and neck of her co-worker, Kristine Merrifield (Merrifield). Surveillance cameras located in the bar area where Hackworth and Merrifield were working captured Hackworth's inescapable act of throwing the bottle cap at Merrifield on video tape.

After the incident, the Employer received a complaint from Merrifield, who told management of Hackworth's actions. Management then requested the surveillance footage and reviewed the incident. Based on the undeniable intention of the act, as shown in the surveillance video, management determined that Hackworth's action constitute a gross violation of the company policies prohibiting violence in the workplace.

Management, which has a "zero tolerance" policy for violent acts such as Hackworth also determined her conduct to be egregious behavior. Consequently, in accordance with the Collective Bargaining Agreement between the Company and the Union, management determined to terminate Hackworth immediately.

At the time Hackworth threw the bottle cap at Merrifield's face, Hackworth was engaged in an individual feud with Merrifield over work shifts, and work stations. Hackworth, who resented Merrifield, had made complaints to management regarding Hackworth's perception that Merrifield was getting special "daddy's little girl" treatment. In fact, the feud from Hackworth's perception, was so intense that on May, 13, 2006, a few days after throwing the bottle cap in Merrifield's face, Hackworth left her regularly scheduled shift early because she refused to associate with Merrifield who was providing



shift breaks for bartenders. Therefore, based on Hackworth's own account, Hackworth and Merrifield were not employees who would have been engaging in harmless on the job pranks intended to be humorous or entertaining.

As the surveillance video reveals, there is no credibility to Hackworth's assertion that she may have meant to throw the bottle cap in the trash, or that she may have been doing one of numerous tricks she does to entertain Resort patrons and other bartenders, and had no intention of hitting Merrifield near her face.

Hackworth's admitted resentment for Merrifield began a few months prior to May 2006. The source of her resentment and hostility was Hackworth's perception that Merrifield got preferential treatment. In particular, Hackworth felt that Merrifield received better working shifts, and also better and more profitable working stations at the Center Bar. By May 2006 Hackworth was outraged by inequity of treatment that she perceived. In Hackworth's words, the perception she had was that Merrifield was being treated like "daddy's little girl" and she was angry about it.

On May 9, 2006 Hackworth took advantage of her routine for much different purposes. This time, as Hackworth opened a bottle, Merrifield approached her and Hackworth seized the opportunity to take a shot at her self proclaimed foe by waiting for Merrifield to get within a very close proximity and then popping the bottle cap and throwing it, directly into the face of Merrifield.

After, Merrifield informed managers of Hackworth's actions, the managers obtained a surveillance video which Steve Uriccho, Food and Beverage Director, John Saucedo Venue Manager and Richard Sims, Assistant General Manager viewed the surveillance video and saw Hackworth throwing the bottle cap toward Merrifield's face.

Mr. Uriccho testified he had seen people lose eyes from stuff they did not think was dangerous such as throwing bottle caps at someone's face, and he was appalled. Mr. Uricchio and Mr. Simms believed it was a terminable offense. In light of the Company policy for zero tolerance prohibiting violent or dangerous acts against co-workers, Uriccho did not feel there was any justification for throwing a bottle cap in the face of another Company employee.

Emel, as she testified, has the authority to override departmental decisions to terminate an employee. Although she agreed Hackworth's offense was grounds to terminate she wanted to make the right decision after she viewed the surveillance tape so she engaged in numerous discussions on the matter.

The Company points out that, subject only to the limitations as may be imposed by the CBA, the Company sets the rules and regulations to discharge, and discipline for cause.

The Company argues that Company was justified for terminating Hackworth after she deliberately threw a bottle cap into the face of another employee. This was a malicious and egregious act. That the Company policies and the CBA support the termination of Hackworth and that progressive discipline was not necessary due to the malicious and intentional nature of Hackworth's act which violated the Company's "zero tolerance" policy in relation to dangerous act or acts of violence. Additionally, the Company argues that because Hackworth's termination was justified for cause there is no remedy available to Hackworth.

## **UNION POSITION**

The Grievant, Miranda Hackworth, was fired for doing something that she and other bartenders do every day that they work at the Chukchansi Casino's Center Bar. Hackworth threw a bottle cap at a coworker. This was such a common occurrence that the coworker did not report this event until five days later and only after Hackworth accused her of receiving favored treatment. The Employer did not investigate the allegation against Hackworth to determine why she threw the bottle cap. Instead it summarily terminated Hackworth's employment. Miranda Hackworth should be reinstated and made whole for lost wages, benefits and tips.

The Grievant worked as a bartender in the "Center Bar". The Center Bar has four stations staffed by bartenders. The four stations are known as the "front yard," the "backyard" and the "girls". Bartenders working the front yard and the backyard serve customers and earn tips. The front yard is the most lucrative . Bartenders working at the "girls" stations service the cocktail servers and , as a result, make less money in tips. Assistant Manager Trish Duran made a schedule each week that showed which station each bartender was assigned to work each shift. The schedule was posted at the bar and by the time clock. This scheduling system was established about two weeks before Hackworth was terminated, and was intended to insure that all bartenders were given equal opportunity to work in the lucrative stations.

The Center Bar has a lively atmosphere in which bartenders have fun with each other and the customers. Bartenders were trained in the FISH philosophy which requires employees to emulate the environment of Pikes's Place Market in Seattle where employees toss fish in the air, joke around, and make customers laugh. Bartenders were

also trained to entertain customers by using “flair” bartending techniques which involve throwing bottles, garnishes, and bottle caps in the air. Building on the FISH philosophy and flair bartending techniques, bartenders at the Center Bar routinely play practical jokes and throw a variety of objects, such as rubber bands, ice, cherries and olives, at their coworkers.

Bartenders also throw numerous bottle caps each shift. Bartender open between two and four hundred beer bottles each shift. They throw these bottle caps toward the trash cans, or up in the air over their heads, or at coworkers, or so they ricochet off things, including coworkers. They throw bottle caps past a coworkers shoulder when aiming for the trash can and the other bartender is in the path. They throw bottle caps directly at other bartenders to get the other bartender’s attention, or to entertain the customers, or simply as a joke.

On May 9, 2006, during her shift at the Center Bar, Miranda Hackworth took the bottle cap off a beer bottle and threw it at her fellow bartender Kristine Merrifield when they encountered each other behind the bar. The cap may have hit Merrifield’s neck. Merrifield was not injured at all. Merrifield brushed her neck, ran her hand threw her hair, and continued working. She never reported the event to casino security. At the time, Hackworth and Merrifield were friends who socialized together outside of work.

On May 13, 2006 Hackworth was scheduled to work in the “front yard”. She arrived at work, got her bank, set up in the front yard, and started to work. Merrifield was also scheduled to work that shift, but she was assigned to the unprofitable “girls” station. Apparently unhappy with her assignment, Merrifield complained to Manager Brian Galt and Supervisor Sherry. Disregarding the posted schedule, Galt switched Hackworth and

Merrifield so that Hackworth was working the girls and Merrifield was in the front yard. Hackworth was upset about the reassignment so she told Galt that she wanted to file a complaint. Hackworth felt that Galt favored Merrifield, and that Merrifield was repeatedly assigned the front yard. Hackworth went to Galt's office and told him that he was playing favoritism and that the union contract did not allow him to favor any workers and that Merrifield was "like daddy's little girl", whatever she wanted she got. Hackworth then returned to work with Merrifield for the rest of the shift without any problems.

On May 14, 2006 Hackworth was scheduled to work from 2 p.m. to 10 p.m. in the girl's station. Merrifield as assigned to work as the breaker. Again, Hackworth and Merrifield worked together without any difficulty. Hackworth was still upset about the prior evening and did not feel well so she requested permission to go home early. Manager Brian Galt approved Hackworth's request for an "early out". It was on this day that Merrifield reported to management that Hackworth had thrown a bottle cap at her on May 9, 2006.

On May 15, 2006 Manager Galt, Supervisor Saucedo reported to Director Steve Uricchio that Merrifield had accused Hackworth of throwing a bottle cap at her while they were working. A surveillance video was obtained and reviewed by Assistant General Manager Simms, with Uricchio and Saucedo. Sims said the team member needs to be terminated immediately Uriccho and Saucedo agreed. Uriccho did not do anything to investigate other than watch the videotape.

On May 16, 2006 Galt brought the Personnel Action Notice for Miranda Hackworth's termination to Team Relations Manger Gilbert Cordero. It was signed by

Cordero. At 5:00 p.m. Hackworth was called into the Human Resources Department and summarily terminated.

Section 23 of the CBA states that the “Employer shall only discipline, suspend or discharge employees for reasons of just cause.” There are seven independent reasons why the Employer violated Section 23 when it terminated Hackworth’s employment, any one of which is sufficient to sustain this grievance.

The Employer failed to prove that the Grievant did anything more than throw a bottle cap toward a coworker. The Grievant may have engaged in horseplay, but did not commit intentional misconduct. There is no evidence that Hackworth intentionally threw the bottle cap at Merrifield.

The Employer failed to prove that Grievant intended to harm her coworker. The video tape does not shed any light on Hackworth’s intent. The only evidence of intent is from Grievant, who wrote on the termination notice she did not maliciously throw a bottle cap at Merrifield. The Employer did not call Merrifield as a witness. An adverse inference should be drawn from the Employer’s failure to present Merrifield’s testimony. Merrifield’s actions also strongly suggest that she did not consider the bottle cap incident to be malicious. She did not report it for five days until after Hackworth complained to Galt about him giving her favored treatment.

The Employer did not terminate Hackworth because she allegedly stated in the meeting she was aiming for the trash can when she hit Merrifield on May 9, 2006. Emel testified that based on the video tape, she concluded that Hackworth was not attempting to throw the bottle cap in the trash. It is well-settled that an Employer is held to the reason for termination stated on the termination notice. Emel did not rescind the

termination notice. Therefore, the Employer cannot add this post hoc justification to its reason for terminating Hackworth's employment. Additionally, two witnesses, Hackworth and Georgette Heck testified that Hackworth actually said in the meeting with Emel that she might have thrown the bottle cap toward the trash. Hackworth was speculating since she could not remember something that occurred a week ago that was routinely done.

The Employer failed to put the Grievant on notice that she could be terminated for horseplay. The Employer's witnesses testified that there was "zero tolerance" for incidents such as throwing bottle caps at other employees. But the Employer did not introduce a written policy and did not present any evidence that Hackworth was notified of this purported policy.

The Employer permits bartenders to throw small objects around the bar. Bartenders regularly throw ice, cherries, olives and bottle caps at one another. Even supervisors have engaged in this type of horseplay. Hackworth and Heck testified that no managers had ever told them not to throw things, even though the managers and supervisors have seen them do this. The Employer did not call a single manager, supervisor or bartender to rebut this testimony.

The Employer treated Hackworth differently from other employees. Bartender Jeanette Ozuna testified that on one occasion she and her coworkers were told by Shift Manager Victor Garcia not to throw ice. Garcia had seen them throwing ice. But they were not disciplined. When an Employer has failed to enforce its rules in the past, the Employer may not punish one employee for violating the unenforced rule "in order to set an example for others" as Director Steve Uricchio testified to.

The Employer did not use progressive discipline Hackworth was not disciplined for related misconduct prior to her termination, and the Employer's witnesses testified that, in making the decision to discharge Hackworth, they did not take into account the prior discipline that was inaccurately listed on Hackworth's termination notice. The only question is whether Hackworth's actions were "egregious". Egregious means outstandingly bad; flagrant. Throwing a bottle cap is not egregious. It is something that bartender do all the time at the Center Bar. It is, at best, insignificant horseplay. The Employer did not present any testimony that a bottle cap can cause serious harm. Merrifield was not injured and did not bother to report the event until nearly a week later when Hackworth complained to Galt that Merrifield was like "daddy's little girl". The Employer's claims of egregious threats to safety were exaggerated and were not credible.

The Employer did not conduct a full and fair investigation. The investigation ended after watching the video footage. A decision to terminate Hackworth was made before she was given the opportunity to explain why she threw a bottle cap at Merrifield. The Employer did not investigate why Hackworth threw a bottle cap at her coworker. The Employer did not investigate what prompted Merrifield to report the event five days after it occurred.

Grievant had a good work record. For all the reasons stated above Hackworth's discharge is not warranted.

The appropriate remedy is to order that Hackworth be reinstated with no loss of seniority and be made whole for lost wages, benefits and tips. Any back pay award to Hackworth must include the tips that Hackworth would have earned if she had not been



discharged. When Arbitrators award tipped employees “make whole” relief, tips are included in the back pay award.

For all of the foregoing reasons, the grievance should be sustained and Miranda Hackworth should be reinstated with no loss of seniority and made whole for lost wages, benefits and tips.

### **ARBITRATOR’S DISCUSSION AND DECISION**

The Grievant, Miranda Hackworth was terminated from employment by Chukchansi Gold Resort and Casino management on May 16, 2006 for “violation of company policies/assault”. The details of the infraction as listed on the Team Member Counseling Notice used to effect the termination action are as follows: “On May 14, 2006, it was reported to the Beverage Manager that bartender Miranda Hackworth had struck bartender Kristine Merrifield with a bottle cap in the neck. This incident was reported to have occurred on May 9, 2006. This incident was verified by surveillance footage from that date. This is a violation of Company standards on code of conduct.” (Union Ex. 1)

The Team Member Counseling Notice (Notice) was dated May 15, 2006 and completed by the Grievant’s manager, Bryan Galt. The notice states a termination must be approved by the Department Head and Human Resource Department Head prior to action being taken. The Notice was signed by Bryan Galt, the Grievant’s Manager, on May 16, 2006, the Department Head, Steve Uricchio on May 16, 2006 and by the Team Relations Manager, Gilbert Cordero on May 16, 2006. Mr. Cordero signed it as the Human Resource Representative. Mr. Cordero reports directly to Marilyn Emel.

Marilyn Emel, Director of Human Resources met with the Miranda Hackworth and her Union representative Georgette Heck at about 5:00 p.m. on May 16, 2006 to advise Miranda Hackworth that she was being terminated from employment. Ms. Emel testified that before she made a final decision to approve the termination she asked what Ms. Hackworth had to say about the bottle cap incident charge on the Notice.

Ms. Hackworth testified that she did not recall the incident because it occurred a week ago according to the Notice, and because she popped about two hundred bottles of beer a day. She also testified that she may have been throwing a bottle cap into the trash but that she did not try to hurt Kristine Merrifield. Ms. Hackworth wrote in the Employee comments on the Notice form "I never maliciously threw a bottle cap at Kristine Merrifield". Ms. Emel's recollection was that Ms. Hackworth stated that she was popping the cap into the trash and Kristine Merrifield has it out for her.

Ms. Emel testified she had viewed the surveillance video of the incident and spoke with Kristine Merrifield, Steve Uricchio, Department Head and Richard Simms, Assistant General Manager about the bottle cap incident. She said she then advised Ms. Hackworth she was terminated from employment.

The Company argues that it terminated Hackworth's employment for inappropriate and "egregious" conduct and violations of the Company policies prohibiting violence in the workplace. During the hearing the Company showed the Arbitrator, Kristin Martin attorney for the Union and the Grievant, Miranda Hackworth the surveillance video in which Hackworth popped a bottle cap toward Merrifield's neck. Based on this evidence the Company states the behavior is violent and "egregious" in

violation of there “zero tolerance” police for violent acts and therefore, warrants termination from employment.

The Company also relies on the verbal complaint made by Kristine Merrifield on May 14, 2006 to her manager, Bryan Galt and to the Human Resource Director, Marilyn Emel that she was struck in the neck by a bottle cap thrown at her by Miranda Hackworth five days earlier on May 9, 2006 and a memo dated May 17, 2006 in which Ms. Merrifield states that during her shift at Center Bar on May 9<sup>th</sup> Miranda H. threw a bottle cap at her and struck her in the neck. Ms. Merrifield also stated in the memo that on several occasion’s Ms. Hackworth had thrown ice, bottle cap’s water and bottles at her and Ms. Merrifield asked Ms. Hackworth to stop many times.

The Union questioned management witness, Gilbert Cordero who signed the termination notice about the accuracy of the previous counseling’s claimed on the Team Member Counseling Notice that was used to terminate the Grievant. Mr. Cordero acknowledged that there was only a verbal notice about a key being misplaced and an attendance issue that was over a year old, and needed to be destroyed per the CBA. Mr. Cordero also testified he did not rely on prior warnings given to the Grievant regarding an attendance issue and a misplaced key in making their determination to terminate Miranda Hackworth. (TR 75-76)

Mr. Steve Uricchio testified that he decided to terminate the Grievant after viewing the surveillance video of the bottle cap being thrown at Kristine Merrifield by Miranda Hackworth because he felt the video showed the Grievant threw the bottle cap and the Grievant had the intent to injure Ms. Merrifield. (TR 44)

The Company argues that throwing the bottle cap was an “egregious” violent act in violation of the Company “Zero Tolerance” policy for violence in the work place. Therefore, the Company is not required to follow progressive discipline as provided in the Collective Bargaining Agreement (CBA). The Company also argues that Section 3, the Management Rights clause in the CBA gives the Company the right to discharge or discipline for cause only subject to limitation as may be imposed by this agreement.

In Section 23 of the Collective Bargaining Agreement (CBA), titled Discipline and Discharge, it states the Employer shall only discipline, suspend or discharge employees for reasons of just cause and the Employer has a right to set reasonable rules and procedures for which discipline may be imposed. This section also states “Except in the event of egregious behavior, discipline should be progressive in nature”.

Since the Company terminated the employment of the Grievant without following progressive discipline, the Arbitrator must determine if the conduct of Grievant was “egregious” behavior to support the discharge. Egregious is defined by the American Heritage College dictionary as conspicuously bad or offensive.

The management representatives relied on the surveillance video of the May 9<sup>th</sup> incident and the verbal complaint of Kristine Merrifield to determine the Grievant committed an egregious act that warranted her termination from employment.

In order to determine whether this act was “egregious” the arbitrator will consider all the relevant evidence in this case. First, the Arbitrator viewed the surveillance tape of the incident with the attorneys for the Company and the Union, along with the Grievant and her Union Representative during the hearing. It shows a bottle cap being popped off a

bottle by the Grievant and thrown towards the neck of Kristine Merrifield. Ms. Merrifield does not appear to respond or react to the incident.

If Kristine Merrifield was injured, Company policy should have required her to file a workers compensation claim. Ms. Merrifield did not file a workers compensation claim and there was not any evidence submitted by management that they requested Merrifield to file a claim. In fact, Ms. Merrifield did not report the incident to her manager until five days after it occurred. This delay strongly suggests the incident was not an egregious act.

A full and fair investigation of the alleged conduct of the Grievant should require, at a minimum, the Company interview Ms. Merrifield who filed the complaint and obtain a statement from her and interview the Grievant and obtain a statement from her before recommending or making a decision to terminate the Grievant. This was not accomplished. Therefore, a full and fair investigation was not completed to get all the facts of the case.

The Grievant wrote on the termination notice that she did not maliciously throw a bottle cap at Kristine Merrifield. The Grievant also testified she did not maliciously throw a bottle cap at Kristine Merrifield. The Company did not produce any evidence to counter the statement or testimony of the Grievant. The Company could have called Kristine Merrifield to testify to support their case. This would have given the attorney for the Grievant a fair opportunity to cross examine Ms. Merrifield. The Company did not call Ms. Merrifield. Therefore an adverse inference is taken by the Arbitrator regarding the claims provided by Ms. Merrifield. Therefore, the written statement and the testimony of

the Grievant are accepted as unchallenged evidence that the Grievant did not maliciously attempt to injure Ms. Merrifield.

The Grievant, Georgette Heck and Jeannette Ozuna have all been or are bartenders at Chukchansi Gold Resort & Casino. They all testified the management encouraged bartenders to tell jokes and entertain guests as they served drinks. This includes throwing items such as ice, bottle caps, cherries and olives. They all testified this type of horseplay was encouraged by Management.

Bartender, Jeannette Ozuna, testified that her manager saw some of the bartenders throwing ice at the cocktail waitresses and told them to stop. However, they were not given any warning or disciplinary action. If the Company is concerned about injury or workers' compensation cost associated with throwing bottle caps and other items, management needs to give employees clear notice and the consequences of employees violating the policy. The Company did not produce any such evidence during the hearing that such notice has been given or they have terminated or disciplined other employees for similar acts.

This Arbitrator, from the facts presented, finds that the Company did not show the Grievant was guilty of an "egregious" offense to support the termination of employment. The Arbitrator finds that a written warning would have been appropriate to support their concerning about avoiding potential injury and potential workers compensation cost. Therefore, for the reasons stated above the Grievant was not terminated from employment for just cause and the grievance is sustained. The remedy is addressed in the following Award section.

## **AWARD**

1. The Grievant, Miranda Hackworth shall be reinstated to her position at the Chukchansi Gold Resort & Casino within 15 working days of this decision.
2. The Grievant, Miranda Hackworth shall be reimbursed all salaries and tips she would have received from the date she was terminated from employment (May 16, 2006) to the date she is reinstated. The amount paid to Grievant shall be reduced by the amount of employee earnings and/or the receipt of unemployment insurance benefits
3. The Grievant, Miranda Hackworth shall not suffer any loss of seniority or fringe benefits by her termination from employment.
4. The Grievant shall have placed in her personnel file a written warning for the conduct that occurred on May 9, 2006.

The Arbitrator shall retain jurisdiction for the sole purpose of resolving any dispute about the remedy addressed in the Award, to include salary and tip computations.

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Dated

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Walter Kaweck, Jr. Arbitrator

